THE HARTER ACT AND ITS LIMITATIONS.

HISTORICAL DEVELOPMENT.

THE first American legislation limiting the liability of ship-owners as common carriers is found in Massachusetts statutes, passed in 1818, revised in 1836, and based upon the Act of 7 George III. The State of Maine passed a statute in 1821 which was almost an exact copy of the Massachusetts statute. This was revised in 1840. After the United States Supreme Court, in 1848, had held the owners of the steamboat Lexington[1] (burned in Long Island Sound) liable for the loss of $18,000 in gold, part of her cargo, shipowners induced Congress to pass in 1851 the "Limited Liability Act",[2] for the purpose of putting American shipping on an equality with that of other maritime nations. This Act was taken primarily from the Act of 26 Geo. III and the Revised Statutes of Maine. By the Act of 1851 vessel owners were relieved from liability for loss or damage to goods on shipboard by fire, unless such fire was caused by the design or neglect of such owner. It also limited the liability of the owner to the value of his interest in the vessel and the freight then due or to become due, if such damage was occasioned or incurred without his privity or knowledge. The Act applied only to cases *ex delicto*. The above Act was followed in 1871 by Revised Statutes § 4281, which relieved the owner from responsibility for valuables, as such, unless the owner of such valuables made known their character and value to either the shipowner or master. Two subsequent amendments were made, those of 1884 and 1886. By these amendments each vessel owner was allowed to limit his individual liability against contractual obligations, to his interest in the vessel, in contracts made by the master or part owner, and this act was made applicable to all vessels.

It was twenty years before this Act received a thorough construction by the United States Supreme Court.[3] In 1860 the "Limited Liability Act" was held to apply to the Great Lakes.[4] Its constitutionality was upheld under the power of Congress to regulate commerce and under the maritime regulation clause the constitution.[5]

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[1] The New Jersey Steam Navigation Co. v. Merchant's Bank (1848), 6 How. 344.

[2] U. S. R. S. §§ 4281-4289, including amendments.

[3] Norwich Co. v. Wright (1871), 13 Wall (U. S.) 104.

[4] Moore, et al. v. American Transportation Co. (1860), 24 How. 1. See also, Craig v. Continental Ins. Co. (1891), 141 U. S. 638.

[5] Providence & New York Steamship Co., v. Hill Mfg. Co. (1883), 109 U. S. 578; Lord v. S. S. Co. (1881), 102 U. S. 541.

Prior to 1893 vessel owners attempted to limit their liability by inserting restriction clauses in bills of lading. These stipulations were recognized and upheld by the English courts, but not to so great an extent by the American courts. This attempted limitation of liability by shipowners led up to the passage of the so-called "Harter Act," February 13, 1893.[6]

WHAT THE "HARTER ACT" IS

This Act has grown out of the Limited Liability Act and amendments thereto, but is not an extenuation of liability. It is rather an Act relieving the vessel owner from all liability or giving him power to exempt himself therefrom by contract, providing, he performs the duties, obligations and conditions imposed upon him by law. It has an important bearing upon commerce to and from all United States ports. It affects all contracts of carriage with nations engaged in transportation to and from this country, because their bills of lading must conform to the American law. Its importance, therefore, is not only to be considered in domestic commerce, but must be reckoned upon as international in its effect. It is also meant to protect certain rights of shippers which carriers by sea have endeavored to restrict by stipulations in bills of lading.

WHAT THE ACT PROHIBITS

UNREASONABLE CLAUSES IN BILLS OF LADING

The prohibitions of the Act, in effect, affirm the previous decisions of the United States courts. The exemptions of the vessel or owner from liability are conditional and unless these conditions are complied with, even stipulations in bills of lading will be held not to relieve the vessel from responsibility.

By § 1 the carriers shall not be relieved from liability for negligence in proper stowage or proper delivery of goods. Therefore, a clause relieving the carrier from liability for non-delivery is void, if the non-delivery is caused by the owner or his servants.

Under § 2 the carriers are prohibited from inserting any clause or covenant in a bill of lading which will lessen or avoid their obligation to deliver goods properly. Any stipulations which lessen or weaken that obligation are void. A bill of lading clear and explicit

[6] U. S. Comp. St. 1901, p. 2946. Entitled "An act relating to navigation of vessels, bills of lading, and certain obligations, duties and rights in connection with the carriage of property." The History of the exigencies which led up to the passage of the "Harter Act" is clearly set forth in a petition by the Glasgow Corn Trade Association to the Marquis of Salisbury. A part of the petition referred to was incorporated in a report of the "Committee on Interstate and Foreign Commerce" of the House of Representatives. House Report 1989, First Session 52d Congress, 1891-2, Vol. 10.

in its terms will not be modified by consideration of what was really meant. A clause in a bill of lading relieving the carrier from liability for goods above the value of $100 per package, unless special agreement had been made, was held to be void, as meaning the carrier should not be liable in any amount for goods exceeding the value of $100 per package. This was contrary to the provisions of the Harter Act.[7]

COVENANTS AGAINST DUE DILIGENCE

In the case of *Calderon* v. *Atlas S. S. Company,*[8] there was a clause in the bill of lading which, in effect, gave the vessel owner the right, in case goods could not be found for delivery while the steamer was at the port of destination, to take them beyond and forward them at the first opportunity, at the company's expense, without rendering the company liable for any delay in delivery or otherwise. The goods were shipped from New York to a foreign port, and upon arrival at their destination they were overlooked, the master failing to examine the books. Finally they were carried back to New York. They were reshipped on another of the company's vessels, which foundered on the voyage, and the goods were lost. It was held that there had been no proper search for the goods and that there was negligence in the failure to deliver. It was held by the court in this case that no such want of delivery could be excused under the Harter Act.

If stipulations in a bill of lading are brought into operation by the negligence of the shipowner or his employees, they are not enforceable in the United States courts.[9] In *Knott* v. *The Botany Mills,*[10] a quantity of wool was stowed in the forward part of the vessel and sugar in the after part of the same hold. At an intermediate port other goods were taken from the after part of the vessel, causing a draught of two feet more water forward than aft. In this condition the ship sailed for a third port, upon arrival at which point, it was found the drainage from the wet sugar had run forward and damaged the wool. The vessel owners were held liable on the ground that the damage was caused by the negligent stowage of the goods. In other words, the fault was one in the

[7] Calderon v. Atlas S. S. Co. (1898), 170 U. S. 272; The Caledonia (1895), 157 U. S. 124; The Maori King, [1895] 2 Q. B. 550. See also Liverpool and Great Western Steam Company v. Phoenix Insurance Company (1889), 129 U. S. 397.

[8] Calderon v. Atlas S. S. Co. (1889), 170 U. S. 272.

[9] Knott v. Botany Mills (1900), 179 U. S. 69; International Navigation Co., v. Farr & Bailey Mfg. Co. (1901), 181 U. S. 218; The Germanic (1903), 124 Fed. 1; and the Southwark (1903), 191 U. S. 1. See also Liverpool and Great Western Steam Company v. Phoenix Insurance Company (1889), 129 U. S. 397.

[10] Knott v. Botany Mills (1900), 179 U. S. 69.

loading and not in the navigation or management of the vessel, within the meaning of the Harter Act.

In the case of *The Germanic*[11] the vessel was topheavy from ice on the rigging and upper deck houses. While discharging the cargo at the dock in New York, no precaution was taken on account of the vessel's unstable condition. She listed to a dangerous degree and broke off a port, through which coal was being put on board. The vessel took two other sudden lists and, with the second, filled with water which came through the port that had been broken off several hours earlier, but had not been repaired. The court held that, while the word "unloading" was not used in § 1 of the Harter Act, the duty properly to discharge the cargo remained as it was before its passage; that is, that negligence could not be excused. This was a failure to use due diligence in the delivery of the cargo within the meaning of the Act and could not be contracted against. The court in this case, referring to § 1 of the Harter Act, said: "It is plain that by virtue of this section a carrier cannot avoid liability for negligence in the loading, stowage, custody, care and delivery of merchandise."

Limitations of Liability to which the Act Extends

Duty to Exercise Due Diligence

(a) *Seaworthiness.*—"Due diligence requires a carefulness of inspection or repair proportionate to the danger."[12] There is a duty imposed upon the shipowner by this Act to exercise due diligence to make his vessel in all respects seaworthy, and to use proper care towards goods and property entrusted to him for carriage. That duty extends to his servants, whether they be sea or land employees, and he cannot claim due diligence when they have negligently performed some duty imposed, by law, upon him. The shipowner is not relieved by merely providing proper construction and equipment, but the diligence required is such as will make the vessel in all respects seaworthy and, further, this duty extends to the owner's servants in the proper use of the equipment before the inception of the voyage and until it has actually commenced.[13] In the case of *The International Navigation Co.*, v. *Farr,*[14] a number of bales of burlap were damaged by sea water during a voyage from Liverpool to Philadelphia. The water entered through a port which,

[11] The Germanic (1903), 124 Fed. 1.

[12] The Edward I. Morrison (1894), 153 U. S. 199.

[13] The Silvia (1898), 171 U. S. 462; The Germanic (1903), 124 Fed. 1; The Caledonia (1895), 157 U. S. 124.

[14] International Navigation Co. v. Farr & Bailey Mfg. Co. (1901), 181 U. S. 218.

though structurally fit, had either been left open or negligently closed before the ship sailed. This was held to be a failure to exercise due diligence, as the ship was unseaworthy at the time of sailing. The same view is expressed by the English court in the case of *The Rossmore*.[15] In this case the Harter Act had been incorporated in the bill of lading by reference. A cargo port was carelessly closed by the ship's carpenter before the vessel sailed. During the voyage a part of the cargo was damaged by sea water entering through this port, which could not be reached and closed on account of freight being stowed against it. It was held that this was a lack of due diligence, and that the ship was unseaworthy at the time of sailing.

The court in *The Silvia*,[16] said: "The test of seaworthiness is whether the vessel is reasonably fit to carry the goods which she undertakes to transport." This is the test commonly applied by both the English and the American courts.

Before the passage of the Harter Act the law was settled by the Supreme Court that in the absence of express contract upon the part of the owner that the vessel was seaworthy at the inception of the voyage, such warranty was absolute, and neither depended upon the knowledge nor diligence of the owner in his efforts to provide a seaworthy vessel. The object of the Harter Act, according to the decisions of the Supreme Court, was to relieve the carrier by sea from his former responsibility as insurer against latent defects as to seaworthiness, beyond the obligation of due diligence to make the ship in all respects seaworthy.

The Caledonia[17] sailed from Boston having, among other things, a number of cattle on board. There was a clause in the bill of lading to the effect that the owner would not be responsible for latent defects in the hull, machinery, etc. After being several days at sea and having encountered no rough weather, the ship lost her propeller by the breaking of the propeller shaft. The ship arrived at the port of destination several days late, and the cattle owner was damaged thereby. Upon inspection it was found that the shaft had broken in the stern tube, where the defect could not have been discovered by an inspection of the shaft unless it had been removed. Mr. Chief Justice FULLER delivered the opinion of the court, and

[15] The Rossmore [1895] 2 Q. B. 408.

[16] The Silvia (1898), 171 U. S. 462.

[17] The Caledonia (1895), 157 U. S. 124; see also The Eugene Vesta (1886), 28 Fed. 762. Opinion by Mr. Justice Brown; cited in the above case and approved by Chief Justice Fuller: "There can be no doubt there is an implied warranty on the part of the carrier that his vessel shall be seaworthy, not only when she begins to take cargo on board, but when she breaks ground for the voyage."

Mr. Justice BROWN delivered a dissenting opinion, with which Mr. Justice HARLAN and Mr. Justice BREWER concurred. It was held that there was an implied warranty on the part of the owner that the vessel was seaworthy at the beginning of the voyage, not only at the time that the cargo was being loaded, but until she actually began the voyage, the idea being that the implied warranty of seaworthiness is to protect the shipper until his insurance begins to run, which is not until the ship has sailed. The vessel being unseaworthy at the inception of the voyage was not seaworthy at any time thereafter. It was further held that the exemption clauses were meant to apply to latent defects that might develop after sailing and not those existing at the time. The Chief Justice in delivering the opinion said: "In my opinion the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage, and this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

A cargo of dressed beef was shipped from Philadelphia to England in a refrigerator ship. The meat, according to the bill of lading, was to be "kept chilled" during the passage. A few hours after sailing the refrigerator machinery broke down and the proper degree of temperature was not maintained thereafter. Upon arrival at the port of destination, the meat was found to be in bad condition. It was held that the ship was unseaworthy at the time of sailing, and therefore liable for the damage.[18]

A ship to be seaworthy must be fit in structure, design, and equipment, safely to transport the goods entrusted to its care. A failure in any of these requisites on its part makes it unseaworthy.[19] "Plainly the main purposes of the act were to relieve the shipowners from liability for latent defects, not discoverable by the utmost care and diligence."[20]

(*b*) *Manning and Equipment.*—The vessel owner is bound to provide a crew capable of handling the ship and all its appurtenances, not only under ordinary circumstances but in any emergency

[18] The Southwark (1903), 191 U. S. 1; The Maori King, [1895] 2 Q. B. 550. This is an analagous case to the Southwark, except that in that case the ship was from Philadelphia to England, laden with dressed beef to be "kept chilled," while herein the vessel was from Australia to England, laden with dressed mutton to be kept "hard frozen."

[19] The Silvia (1889), 171 U. S. 462; The Carib Prince (1898), 170 U. S. 655; Insurance Co. of North America v. North German Lloyd Co. (1900), 106 Fed. 973; Steel v. State Line S. S. Co. (1877), 3 Appeal cases 72.

[20] The Irrawaddy (1898), 171 U. S. 187, 192.

that is likely to arise in this mode of transportation. An American ship, manned with Chinese sailors, struck on the rocks near the Golden Gate, California, and sank. Most of the passengers and crew were drowned, because of the inability of the officers to communicate directly with the sailors. There were only two men on board who could talk with them, and the orders, therefore, had to be repeated through a Chinese boatswain. This was held by the court to be an improper and insufficient crew.[21]

A bark sailed from Havana, Cuba, for Boston, Mass. While off the Virginia coast, it was run down in a dense fog and sunk by the steamer Niagara. It developed at the trial that the fog-horn required by law had not been tested from the time the ship sailed from Philadelphia for Havana, until a few minutes prior to the collision, at which time it failed to work, and a mouth-horn had to be used, which proved inadequate. It was held that because of the failure to test the fog-horn before leaving Havana, in the absence of proof to the contrary, the vessel was presumed to be unseaworthy for lack of equipment.[22]

FAULTS OR ERRORS IN NAVIGATION AND MANAGEMENT

The English and American courts are practically in accord as to what constitutes "navigation and management". They include the control, during the voyage, of the vessel and all its appurtenances, that is necessary for the protection of the ship and its cargo against the "inroads of the sea". In *The Silvia*,[23] a cargo of sugar was damaged by sea-water. There was a glass deadlight in a compartment where freight was sometimes carried, and where on this occasion sails, ropes, etc., were stowed. This deadlight was also fitted with an iron dummy or cover to be put down in rough weather, or when the glass was under water. On this trip the deadlight was closed before sailing, but the dummy was left open to give light in the compartment during the trip. The hatches were on, but they could have been removed and the dummy closed if necessary, within a few minutes. Bad weather was encountered during the voyage and through some unknown cause the deadlight was broken and water entered the ship, causing the damage in question. It was held that leaving the dummy open at the time of sailing and in fair weather, while it could be gotten at and closed in a few minutes, if necessary, did not make the ship unseaworthy. It was held further

[21] In re Pacific Mail S. S. Co. (1904), 130 Fed. 76; see also The Fri. (1905), 140 Fed. 123; The Cygnet (1903), 126 Fed. 742; The Guildhall (1893), 58 Fed. 796.

[22] The Niagara (1898), 84 Fed. 902.

[23] The Silvia (1898), 171 U. S. 462.

that the failure to close the dummy when the bad weather came on was a fault or error in navigation or management of the vessel, for which the Harter Act would relieve the owner. He had furnished a vessel, which at the inception of the voyage was seaworthy. Therefore, the failure of his servants properly to use the equipment furnished relieved such vessel owner. The law, as laid down by the Supreme Court decisions, is that when the shipowner can show that he has discharged the duties required of him by law; that is, used due diligence to make the vessel in all respects seaworthy, he shall be relieved from responsibility for fault or error in the navigation or management over which he has no control during the voyage.[24]

There are a few English cases giving this principle a little broader construction than the courts of this country have placed upon it but, on the whole, the interpretations are about the same. A British vessel, sailing from New Orleans to London, had in its bill of lading the usual exception against perils of the sea and in addition words incorporating the Harter Act. Much bad weather was encountered on the voyage and, upon arrival, many pipes in the holds leading to the water-bottom were found to be broken from the severe straining the vessel had received on the trip. While discharging the cargo one of the engineers, who knew of the broken pipes, filled one of the ballast tanks without first examining or testing the sounding pipes to such tank, which pipes later proved to be defective and the cause of the damage complained of here. The court said that there was a distinction between navigation and management and that the latter extended a little beyond the former, just far enough to include such cases as this one; that is, to acts which do not affect the navigation or management of the vessel but do affect the ship itself. The owner was held to be liable. There seems to be a distinction drawn between the want of care concerning the cargo and a want of care of the vessel affecting the cargo.[25]

SEA PERILS

"Perils of the sea," as construed by the Supreme Court, are, in effect, marine casualties resulting from the action of the elements, which cannot be prevented by the intervention of human power. In other words, perils of the sea are non-preventable accidents

[24] The Chattahoochee (1899), 173 U. S. 540; International Navigation Co. v. Farr & Bailey Mfg. Co. (1901), 181 U. S. 218; Carib Prince (1898), 170 U. S. 655; The Etona (1894), 64 Fed. 880, affirmed (1896), 71 Fed. 895; The Sandfield (1897), 79 Fed. 371.

[25] The Glenochil, [1896] Prob. 10, decided 1895; see also The Ferro, [1893] Prob. 38; Hedley v. Pinkney & Sons S. S. Co., [1892], I Q. B. 58; The Southgate, [1893], Prob. 329; and The Rossmore, [1895], 2 Q. B. 408.

caused by the elements. When the negligence of the vessel owner in any way makes the danger operative, exemption clauses in a bill of lading against "perils of the sea" will not relieve him from responsibility. The negligence alone will be presumed to have caused the loss.[26]

RIGHT TO DEVIATE FROM COURSE

Under the Harter Act, a vessel has the right to deviate from its course to save life and property, without being liable in damages to the owners of the cargo on board, provided such deviations are reasonable and the ship resumes the course as soon as the circumstances will permit.[27] In the above case the master went to the assistance of another vessel and towed it to safety in San Francisco Bay. He then remained by the disabled vessel and pumped it out; after which he towed it to dry-dock. There were several harbor tugs present when this latter service began. The court held that it was an undue deviation to tow the vessel to dry-dock when other service could have been obtained for that purpose.[28]

VESSELS ENTITLED TO EXEMPTION

AMERICAN

It was stated in the introduction that the "Limited Liability Act" of 1851 has been held by the United States Supreme Court to apply to vessels trading between sea ports within the same state; also that the act extended to vessels sailing on the Great Lakes.[29] There seems to be no Supreme Court case holding that the Harter Act applies to vessels trading between American sea ports in different states and on the Great Lakes. The Supreme Court has frequently referred to the decisions of the lower courts which have held that the Act does apply to vessels engaged in American commerce. This, however, was only dictum by the Supreme Court, the question never having been before it for adjudication.

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[26] The Caledonia (1895), 157 U. S. 124; The Folmina (1909), 212 U. S. 354; The G. R. Booth (1898), 171 U. S. 450; The Warren Adams (1896), 74 Fed. 413; and The Majestic (1897), 166 U. S. 375, wherein "perils of the sea" and "act of God" are distinguished. This is an excellent case upon the subject.

When an official survey is being made of a vessel, under protest against perils of the sea, the surveyors take into consideration all damages done to the vessel by the elements, all records entered in the ship's log-book, and statements of the officers and crew. If the evidence thus obtained is reasonable, the ship is relieved from liability.

[27] In re Meyers (1896), 74 Fed. 881.

[28] The Chinese Prince (1894), 61 Fed. 697; and The Florence (1895), 65 Fed. 248.

[29] Lord v. Steamship Co. (1881), 102 U. S. 541; and Craig v. Continental Insurance Co. (1891), 141 U. S. 638.

In the case of *The E. A. Shores, Jr.*,[30] it was held that notwithstanding §§ 1, 2 and 4 refer only to shipping "between ports of the United States and foreign ports," § 3 governs vessels engaged in domestic transportation. This case was tried in the United States District Court at Milwaukee, and had reference to transportation on the Great Lakes. The steamer in this case was stranded through negligence in navigation on a trip from Chicago to Milwaukee, and the court held it not liable.

In the case of *In re Piper*,[31] a case in which the vessel was trading only between ports in the same state, but carrying goods on through bills of lading; that is, for interstate transportation; it was held that the owner was entitled to the protection of the Harter Act. This case also involved a point in pleading which the writer has not found elsewhere under this Act. It is, that the owner may set up an alternative prayer for relief; that is, he may deny that his vessel is in any way responsible for the damage and, if the evidence discloses negligent navigation or management, he may then have the protection of the Harter Act.[32] The application of the Act to American vessels trading between ports of the United States and foreign ports is too obvious to merit consideration here. This is clearly brought out by the cases in which the application of the law to foreign vessels has been considered by the Supreme Court.

FOREIGN

The Act, in its terms as well as in its intent, includes all foreign vessels engaged in the transportation of goods to or from any port in the United States. This is now recognized by every maritime nation and the ships of nearly all the principal lines transporting goods between American and foreign ports have expressly, or by words of reference, incorporated the Harter Act in their bills of lading. It is true, that many of the companies now insert clauses in their bills of lading to the effect that all disputes arising under the contract shall be settled by the laws of their respective nations, but such clauses are not recognized by the Federal Courts. A casual examination of a bill of lading form, commonly used by the transatlantic lines, will sustain this statement. Besides the stipulation referred to above they have many which are contrary to the decisions of the United States Supreme Court. The Harter Act applies to foreign vessels transporting merchandise from foreign to American ports so that the vessel and the owner are liable for the negli-

[30] E. A. Shores Jr. (1896), 73 Fed. 342.
[31] In re Piper (1898), 86 Fed. 670.
[32] See also The Nettie Quill (1903), 124 Fed. 667.

gence of their servants, notwithstanding clauses in bills of lading expressly agreed to by the parties as above stated. There seems to be one exception, however; that is, when the loss or damage has occurred at a foreign port of shipment and the contract is valid and effectual there.[33]

The language of the Harter Act is more specific in defining the vessels to which it is applicable than is the Act of 1851, which simply uses the words, "any vessel". The Harter Act confines it to "any vessel transporting merchandise or property to or from any port in the United States." The United States courts hold that the Act is applicable to foreign as well as American vessels; further, that it is against public policy to allow foreign vessels, by stipulations in bills of lading, to avoid the jurisdiction of American courts. Such clauses are, therefore, held to be void and of no effect.[34]

THE CONTRACTING SHIP

The Harter Act has changed the contractual relation formerly existing between the vessel owner and shipper, but just how far the Act extends is not yet settled. The Supreme Court has held that the Act has modified all contracts of affreightment between the ship and cargo, without reaching the other liabilities of the vessel. It is now settled that the Act has not changed the former rights or obligations of vessels to each other, in collision cases. The measure of damages between them remains the same as before the passage of the Act. Between two vessels, each at fault for a collision, the innocent cargo owner could sue either vessel and recover for the whole loss, thus having but one suit for damages. The English rule on this point was formerly, as now, that the cargo owner could recover from one vessel, only its proportionate share of the damage, thus causing the trouble and expense of two suits.[35]

Under the Harter Act the owner of the contracting vessel is relieved from liability for the negligence of his servants, conditionally. The vessel, therefore, is now relieved from responsibility in such a case as above referred to, but the other offending vessel, a third party, is not relieved by this Act. But when such third party is called upon to contribute to the loss of the contracting vessel, it may

[33] Knott v. Botany Mills (1900), 179 U. S. 69; The Kensington (1902), 183 U. S. 263; the Guildhall (1893), 58 Fed. 796. For exception see Bactyer v. Compazrin Trans. Co., 59 Fed. 789.

[34] The Silvia (1898), 171 U. S. 462; The Chattahoochee (1899), 173 U. S. 540; The Etona (1894), 64 Fed. 880.

[35] See The North Star (1882), 106 U. S. 17; also The Manitoba (1895), 122 U. S. 97.

set up half the amount paid to the innocent cargo owner as a set-off against such contracting vessel.[36]

There has been much doubt as to whether or not the Harter Act applies to passengers and their baggage. Judge BROWN held in the case of *The Rosendale*[37] that personal injuries to passengers and damage to their baggage not shipped as merchandise, for which freight was paid, did not come within the purpose of the Harter Act. The same view was taken by the Circuit Court of Appeals.[38] This case, however, was taken to the Supreme Court and the decision of the lower court was reversed on another point. The court said: "Whether or not the Harter Act concerns the carriage of passengers and their baggage, it becomes unnecessary to intimate any opinion as to whether the provisions of the Act in question apply to such contracts."[39] The Circuit Court of Appeals in *La Bourgogne*[40] cited the opinion of the Circuit Court of Appeals in *The Kensington* as authority, maintaining the proposition that the Harter Act did not apply to passengers and their baggage. When the case of *La Bourgogne* came before the Supreme Court the opinion of the lower court was affirmed, and only a reference made to the point here involved. The Supreme Court, while it has avoided rendering an opinion upon this aspect of the Act, has tacitly adopted the rule laid down in *The Rosendale* and *The Kensington*.[41] In this way, the Supreme Court has now, after four years, adopted the rule laid down in a case brought before it for adjudication, principally upon this point, but reversed upon another.

DUTY TO ISSUE BILL OF LADING

There seems to be but one case in which criminal prosecution has been attempted under the Harter Act.[42] The shipper of a number of walnut logs from Baltimore, Maryland, to Hamburg, Germany, objected to certain stipulations in the bill of lading, and prosecution was begun against the local agent of the steamship company. The court took up the various stipulations in the bill of lading and justified all of them under the Fourth Section of the Harter Act, and held that there was no violation of §§ 1 and 2, which would sustain

[36] The Delaware (1896), 161 U. S. 459; The Chattachoochee (1899), 173 U. S. 540; The Strathdon (1899), 101 Fed. 600.

[37] The Rosendale (1898), 88 Fed. 324.

[38] The Kensington (1899), 94 Fed. 885, 36 C. C. A. 533, (1898), 88 Fed. 331.

[39] The Kensington (1902), 183 U. S. 263.

[40] La Bourgogne (1906), 144 Fed. 781.

[41] The Kensington (1902), 183 U. S. 263. See also The Hamilton (1907), 207 U. S. 398.

[42] United States v. Cobb (1906), 163 Fed. 791.

an action against the agent for issuing the bill of lading complained of. The clauses complained of in this case were only the usual clauses and the decision appears to be a very fair and reasonable one. The court held further that the penalty imposed (inter alia) for inserting in bills of lading clauses against liability for negligence and for refusing to issue bills of lading, makes the Act a criminal statute. Notwithstanding the fact that a bill of lading containing clauses contrary to the Harter Act is void when issued, the owner, master or agent issuing the same is subject to criminal prosecution.

In *The Isola Di Procida,*[43] a bill of lading was given, acknowledging eight hundred tons of limestone to have been received on board the vessel September 30th. It was signed "For the Master, per pro. Munzone Mineo & Co., Agents." The ship was at Marseilles and did not reach Sicily, where the limestone was to be loaded, until October 12th, being that much late at New York. The price of limestone had fallen, and the suit was for damages caused by the false representations in the bill of lading. The court held that the Harter Act has not changed the rule established by the United States courts, that a false bill of lading is not binding upon the shipowner, and, further, that the ship is liable, *in rem,* for fines imposed against the party issuing a false bill of lading, but that no lien was created against the vessel for damages arising therefrom.[44]

Rules of Construction

STRICT CONSTRUCTION

Both the English and the American courts hold that the Harter Act must be strictly construed. It is understood from the decisions of the courts, in both this country and in England that the Act is not meant to be a local measure, applicable only to American vessels, but that it is a modification of the common law of a general and universal character. The Act first excuses the owner from direct liability in respect to the cargo, and, second, the exemptions pertain primarily to faults or errors connected with the navigation or management of the ship, and not to the cargo. This Act has been declared to be a shield against a particular form of attack against shipowners; namely, a claim in tort for negligence, or in contract for a breach of the agreement to carry the goods safely. The Supreme Court has held in effect, that the Act has not made the vessel owner's acts right that were previously wrongful. It is, therefore, clear that the Harter Act has not extinguished the faults,

[43] The Isola Di Procida (1902), 124 Fed. 942.

[44] See also Dowgate S. S. Co. v. Arbuckle (1907), 158 Fed. 179.

negligence or torts of shipowners. The reason given by both English and American courts for holding to a strict construction is that the shipowners have an opportunity to inspect and know the condition of their vessels, which is a duty imposed upon them by law, while shippers have no opportunity to make an inspection of the vessels, even if they were capable of judging their condition. The shipper, therefore, is not on the same footing with the vessel owner, but is bound to accept the terms offered by the ship owner, or wait and go through a long expensive course of litigation.[45]

EFFECT ON GENERAL AVERAGE CONTRIBUTION

General average is a contribution between two or more parties jointly interested in a common maritime adventure for sacrifices voluntarily made, of a part for the benefit of the whole. The Supreme Court has held[46] that, while the Harter Act relieved the vessel owner from liability for the negligence of his servants in the navigation or management of the vessel, it did not give him the right to recover from the cargo owner any contribution in general average for his own losses caused by the negligence of his servants, in this case the master. This decision proceeds apparently upon the theory that the Act was intended to relieve the vessel owner from liability as an insurer against the negligence of his servants, if without his privity or knowledge, and was not intended to give him affirmative relief against the cargo owner for such negligence. The court did not decide, however, whether or not the cargo owner could recover in general average contribution from the vessel owner. In two subsequent cases, one in the District Court and the other in the Circuit Court of Appeals, the right of the cargo owner to recover in general average was considered. In *The Strathdon*[47] it was held that the vessel owner had no relief against the cargo owner for a fire caused by the negligence of the ship's crew, but that in a suit by the cargo owner for average contribution from the vessel owner, the latter could set up the damage caused by fire to the ship, against such claim for contribution by the shipper. In the opinion of the court, the cargo owner should not be allowed to recover against the shipowner in general average for damage caused by the negligence of his servants, because by changing his form of action he could

[45] The Silvia (1898), 171 U. S. 462; The Glenochil, [1896], Prob. 10; The Kensington (1898), 94 Fed. 885, 36 C. C. A. 533; (1902), 183 U. S. 263. This latter case takes up the conflict of laws and treats principally upon clauses on passenger tickets and bills of lading.

[46] The Irrawaddy (1898), 171 U. S. 187, 192.

[47] The Strathdon (1899), 101 Fed. 600.

recover for losses for which the vessel owner was not responsible. Referring to the rights of the respective parties when both have suffered loss, the court said: "When the cargo owner invokes a recovery in general average in such case the shipowner is also entitled to contribution as though innocent of fault; otherwise the cargo owner would recover by selecting his form of procedure for losses for which the shipowner was not responsible." By following out the line of reasoning in this case, the cargo owner would have no right to sue the vessel owner for average contribution unless the shipowner had also suffered some damage, which he could off-set against the claim for contribution.

In *The Jason*,[48] the vessel was stranded through the negligence of the master, later gotten off by salvors under a contract with the vessel owner for forty per cent of its salved value, but no contract was made with reference to the cargo. When the ship and most of the cargo arrived in port, part having been jettisoned, the cargo owner signed a general average bond and settled with the salvors for much less than the vessel's rate of salvage. The shipowner sued to recover in general average this difference, and a counter-claim was made by the cargo owner. The original libel was dismissed. The court held, however, that the cargo owners were entitled to recover, but that the amount paid to the salvers by the vessel owner must be taken into consideration. By the reasoning of the court here, the cargo owners should be allowed to recover in general average, because this was a right existing since the earliest maritime usages and customs were established. Furthermore, it was not in any way connected with the contract of affreightment or dependent thereon, hence it was not affected by the Harter Act. The court in this case said: "The effect of the decision in *The Strathdon* is to blot out the fact of negligence when the action is promoted by an innocent libellant, and leave it as a bar to any suit begun by the tort-feasor."

These two cases are reconcilable upon the point allowing the vessel owner to set up his loss, caused by the negligence of his servants without his privity or knowledge, against claims for average contribution; but they leave the opinions of two lower courts standing one on each side of the proposition as to whether or not the cargo owner can recover in general average for his losses from a vessel owner who has himself suffered no damage. While this point was not squarely before the court in either case, the reasoning of each reached an opposite conclusion. The point is, clearly, one

[48] The Jason (1908), 162 Fed. 56.

in dispute, and is the most interesting point left unsettled under the Harter Act.[49]

PRIORITY OF LIEN

A very important point under this head has been left undecided or, at least, unsettled by the Supreme Court. Two fundamental principles have been established by the Supreme Court, however, and it seems that they have not been changed by the decisions under the Harter Act, except as stated below. The Supreme Court has decided, first, that each vessel at fault shall bear an equal portion of the damages and, second, that the innocent cargo owner may sue either and recover in full for his loss.[50] The Harter Act has reduced the cargo owner's remedy to the offending vessel, the third party, providing the collision was without the privity or knowledge of the owner.[51] As between the vessels, when both are in fault, it is proper to deduct one-half the value of the cargo from half the value of the sunken ship and limit recovery to the difference between such sums. There seems to be only one case thus far decided wherein the priority of lien has been considered as between the vessel owner and the cargo owner, the contracting parties. Here the vessels were each at fault, one being a total loss and the other sustaining small damage only. The owner of the lost vessel began proceedings for his damage, the officers and crew for the loss of their effects, suing through the vessel owner, and, finally, the cargo owner for the value of his goods lost.[52] The value of the surviving vessel was paid into court. The owner of the lost vessel was awarded judgment for the full amount of the value of his vessel; the officers and crew got judgment for only one-half the value of their effects because the negligence of their ship was imputable to them. A judgment for the full value of the goods lost was entered for the cargo owner. The fund was not more than half enough to satisfy these claims. The court held that the cargo owner had the prior lien and should be paid in full ahead of the others. This decision was based upon the ground that the negligence of the officers of the vessel contributed to cause the loss, and that both they and the owner were prevented, thereby, from recovering with or before the cargo owner. This seems to work out along the same

[49] The origin and nature of the law of general average is thoroughly explained by Mr. Justice Gray in the case of Ralli v. Troop (1895), 157 U. S. 386.

[50] The Alabama (1875), 92 U. S. 695; The Atlas (1876), 93 U. S. 302.

[51] The Delaware (1896), 161 U. S. 459; The Chattahoochee (1899), 173 U. S. 540.

[52] In re Lakeland Trans. Co. (1900), 103 Fed. 328; Affirmed 111 Fed. 601; Certiorari denied by the Supreme Court 183 U. S. 699, 184 U. S. 698, 699.

line of reasoning that was used in the case of *The Irrawaddy*,[53] but it was not carried out by the court to that conclusion. This seems to be the only case upon the subject, decided under the Harter Act. Judge SWAN, in delivering the opinion, said that this question had never before been decided by the federal courts.

The question of the priority of lien, when one vessel is entirely innocent, does not seem to have been before the federal courts, and is one of much interest and importance. Whether or not the vessel owner, in that case, could recover with the cargo owner; that is, have an equal lien for his damages against the fund or offending vessel, is merely a matter of conjecture and, therefore, deserves no consideration here.

BURDEN OF PROOF

There are many cases that in some way refer to the question as to who has the burden of proof in cases arising under the Harter Act. This has been settled in a recent decision by the Supreme Court. In this case, a steamer from Japan to New York, with a cargo of rice, had part of such cargo damaged by sea water. The damage was not discovered until after arrival at New York, and the owner could not or would not account for the presence of such sea water. It was held that in the absence of proof to the contrary, the presumption was against the vessel owner, that the mere presence of sea water is not to be presumed to be the result of sea perils. The burden, therefore, is upon the vessel owner to show that the damage was from one of the causes from which the vessel is exempted under the Harter Act.[54] The same rule has been laid down by the English courts. The reason given for this view is practically the same as that given for requiring express clauses in bills of lading, and holding to a strict construction of them and the Act; namely, that the cargo owner is not on the same footing with the vessel owner to inspect or learn of the vessel's condition or the causes of damage, and that he must accept the terms offered by the carrier or not ship the goods.

CONCLUSION

Under the law of the United States, stipulations in bills of lading of carriers by sea which exempt the vessel owner from liability from his own or his servants' negligence are void as agaisnt public

[53] The Irrawaddy (1898), 171 U. S. 187, 192.

[54] Jahn v. Folmina (1909), 212 U. S. 354, 29 Sup. Ct. 363; The Wildcroft (1905), 201 U. S. 378; The Majestic (1897), 166 U. S. 375; The Edward I. Morrison (1894), 153 U. S. 199; The G. R. Booth (1898), 171 U. S. 450.

policy. Clauses in all contracts of affreightment to be valid, must be reasonable, otherwise no effect is given to them in the United States courts. This is true whether the contract is made in the United States or abroad, even when such clauses are valid under the law of that place, if it is to be performed in whole or in part within the United States. The fact that the parties have expressly agreed that the contract shall be governed by the law of such foreign countries makes no difference upon this point. This, too, is based upon public policy. There is, apparently, one exception to this general rule, that is, when damage or loss occurs at a foreign port of shipment and the clauses in the contract of affreightment are valid and effectual there.

The law now imposes upon the shipowner the duty to exercise due diligence in the care, stowage and handling of cargo. This duty extends to his servants also, and cannot be contracted against. There is a duty to provide a seaworthy vessel at the inception of the voyage, and the owner must show more than due diligence in the performance of such duty. He must show that his vessel is really fit for the purpose and voyage undertaken. This includes not only officers and a crew competent to act under ordinary circumstances, but men that are competent to handle the vessel and her appurtenances in any emergency that is likely to arise. Neither the owner nor the vessel is now liable for losses or damages caused by faults or errors in the navigation or management of such vessel, happening without his privity or knowledge, providing however he has used the degree of diligence towards the ship and cargo required of him by law.

Vessel owners may contract against perils of the sea, or even be exempted from liability without so contracting, if it is clearly proved that the damage was caused by sea perils, and that the vessel owner has in no way made the damage operative.

Vessels may deviate from their courses for the purpose of saving life and property, without being liable to the cargo owner, providing no unnecessary deviation or delay is made.

The Harter Act extends alike to foreign and American vessels; one is given no more nor less under it than the other. It extends to American vessels trading between American ports; to those on the Great Lakes, also to those trading between ports of the same State, carrying goods for interstate shipment. The Act does not extend to collision cases, except between the contracting ship and shipper. It has not changed the liability of vessels to each other or their duty to contribute equally to losses where both are at fault. It has not abrogated the right of an innocent cargo owner to recover from an

offending vessel, a third party. The Act is applicable only between the vessel and shipper of goods and has not altered the rights and duties between either of these and third parties.

The duty remains as before to furnish a true bill of lading, but makes the vessel liable *in rem* for the penalty imposed for refusing to give a bill of lading, or for giving one containing clauses inconsistent with the Harter Act and for false statements therein contained.

The tendency of the decisions has been to leave the liability of a vessel and its owner as it was defined and enforced by the law maritime and the common law,[55] except where the Act plainly and definitely asserts a different liability. In other words, the United States courts have held to a strict construction of the Harter Act, and have not allowed carriers to be exempted from liability in doubtful and uncertain cases.

The Act has excused vessel owners from liability for damages or loss of goods in their care, happening without their fault, privity or knowledge. But it has not given such owners a right to recover in general average contribution for damages caused by the negligence of their servants. The priority of liens as between the vessel owner and the shipper, against a third party, has been worked out on the same principle as last above stated, by the district court, affirmed by the Circuit Court of Appeals and certiorari thereon denied by the Supreme Court.

The burden of showing that damage to goods was caused in some manner excused by the Harter Act is imposed upon the vessel owner, and, unless he shows that such damage or loss arose from some cause for which he is not answerable, the presumption is that the damage was caused by his fault or that of his servants, for which he is liable.

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[55] The law maritime is in force in this country only in so far as it has been adopted by the Federal Courts and Acts of Congress.